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Case No.

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IN THE

SUPREME COURT OF THE UNITED STATES

RALEIGH PORTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

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SUPREME COURT OF THE UNITED STATES

RALEIGH PORTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Where the jury recommends a sentence of life imprisonment, does the imposition of a death sentence violate the constitutional guarantee against double jeopardy, deprive the condemned person of due process of law, or subject him to cruel and unusual punishment?

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OPINION BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported and is reproduced in the appendix. (A1-6)

JURISDICTION

The Supreme Court of Florida issued the opinion and judgment in this case on January 27, 1983. (A1-6) The Supreme Court of Florida denied Petitioner's timely motion for rehearing on April 28, 1983. (A7) Title 28 United States Code, Section 1257(3), and Rule 17 of the United States Supreme Court Rules confer jurisdiction upon this Court to review the judgment in question. Petitioner asserted below and is asserting here the deprivation of his rights secured by the constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States in part:

> ...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb....

Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV to the Constitution of the United States in part:

> SECTION 1. ...[N]or shall any State deprive any person of life, liberty, or property, without due process of law....

Section 921.141, Florida Statutes (1977), is reproduced in the appendix. (A8,9)

STATEMENT OF THE CASE

A jury convicted petitioner of first-degree murder for the deaths of an elderly man and his wife. Notwithstanding the jury's recommendation of life imprisonment, the trial court sentenced petitioner to death. The Supreme Court of Florida affirmed the convictions but remanded for resentencing. Porter v. State, 400 So.2d 5 (Fla.1981). (A10-13) The trial court resentenced petitioner to death. On appeal, petitioner argued, inter alia, that where the jury recommended a life sentence, imposition of the death penalty violated the constitutional prohibition against double jeopardy, deprived petitioner of due process of law, and subjected him to cruel and unusual punishment. The Supreme Court of Florida affirmed the death sentences and denied rehearing. (A1-7)

REASONS FOR GRANTING THE WRIT

I.

WHERE THE JURY RECOMMENDS A SENTENCE OF LIFE IMPRISONMENT, IMPOSITION OF A DEATH SENTENCE VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY.

This Court has held that double jeopardy principles prevented a Missouri capital defendant from being subjected to the possibility of a death sentence upon retrial where the first jury returned a sentencing verdict of life imprisonment. Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). This Court distinguished earlier cases in which it held that the Double Jeopardy Clause did not apply to sentencing on the basis of the unique character of a penalty hearing in a capital case; the jury has to consider new facts in a separate proceeding under a burden of proof beyond a reasonable doubt. Because the Missouri sentencing proceeding had all the features of a trial to determine guilt, this Court reasoned that double jeopardy principles applied.

> The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those em-

> ployed in any of the Court's cases where the Double Jeopardy Clause has been inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt of innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.
>
> * * *

Id., 451 U.S. at 438, 68 L.Ed.2d at 278-279 (footnote omitted).

> By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, however, Missouri explicitly requires the jury to determine whether the prosecution has "proved its case." Both Burks and Green, as has been noted, state an exception to the general rule relied upon in North Carolina v. Pearce. That exception is applicable here, and we therefore refrain from extending the rationale of Pearce to the very different facts of the present case. Chief Justice Bardgett, in his dissent from the ruling of the Missouri Supreme Court majority, observed that the sentence of life imprisonment which petitioner received at his first trial meant that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." 594 S.W.2d, at 922. We agree.
>
> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die: [quotation omitted]
>
> * * *

Id., 451 U.S. at 445, 68 L.Ed.2d at 282-283.

> Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty, at his retrial.

Id., 451 U.S. at 446, 68 L.Ed.2d at 284 (footnote omitted).

The rationale in Bullington applies equally to Florida's procedures. Like Missouri, Florida has a separate hearing before the jury in a capital trial regarding sentencing. §921.141(2), Fla.Stat. Like Missouri, Florida law also requires that the State prove aggravating factors beyond a reasonable doubt. State v. Dixon, 283 So.2d 1,9 (Fla.1973), cert.den.sub nom., Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Like Missouri, Florida's capital sentencing procedures are in every material respect a trial resembling the one to determine guilt or innocence. Bullington v. Missouri controls this case, and the trial judge's imposition of death after the jury recommended life violated the double jeopardy provisions of the United States Constitution. Amend. V and XIV, U.S. Const.

The Supreme Court of Florida rejected petitioner's double jeopardy claim on the basis of its prior decisions in Douglas v. State, 373 So.2d 895 (Fla.1979), and subsequent cases. (A5) In Douglas, the court announced two reasons for holding that double jeopardy does not bar a death sentence after a life recommendation: (1) that this Court approved the procedure of a judge's overriding a jury recommendation of life in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and (2) that a binding jury recommendation of life would violate Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). These two reasons do not form an adequate basis to reject petitioner's double jeopardy claim. First, a double jeopardy issue was not before this Court in Proffitt, and it is axiomatic that issues not raised in this Court on certiorari are not decided. E.g., Mazer v. Stein, 347 U.S. 201,208, 74 S.Ct. 460, 98 L.Ed. 630 (1954). Second, a binding jury recommendation for mercy would not conflict with the mandate of Furman. Only the arbitrary infliction of death is forbidden. See Gregg v. Georgia, 428 U.S. 153,203, 96 S.Ct. 2909, 49 L.Ed.2d 859,891 (1976)(approving a system with a binding jury determination of life imprisonment).

This Court should grant certiorari in order to correct the Supreme Court of Florida's misunderstanding of Furman and the application of double jeopardy principles to capital sentencing as announced in Bullington.

II.

WHERE THE JURY RECOMMENDS A SENTENCE OF LIFE IMPRISONMENT, IMPOSITION OF A DEATH SENTENCE UNDER THE FLORIDA PROCEDURE DEPRIVES THE CONDEMNED PERSON OF HIS LIFE WITHOUT DUE PROCESS OF LAW.

As stated by this Court in Gardner v. Florida, 430 U.S. 349,358, 97 S.Ct. 1197, 51 L.Ed.2d 393,402 (1977), "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." For a revocation of parole or probation one of the minimum requirements of due process is a written statement by the factfinders as to the evidence relied upon and the reasons for the revocation. Gagnon v. Scarpelli, 411 U.S. 778,786, 93 S.Ct. 1756, 36 L.Ed.2d 656,664 (1973); Morrissey v. Brewer, 408 U.S. 471,489, 92 S.Ct. 2593, 33 L.Ed.2d 484,499 (1972). Since the interests of the accused are even greater when the death penalty is imposed than when parole or probation is revoked, surely the minimum requirements of due process for imposition of the death penalty are at least as stringent as those for revocation of parole or probation. Thus, due process must require a written statement by the factfinders as to the evidence relied upon and the reasons for imposing the death penalty.

Under the Florida procedure for imposing the death penalty there are two distinct finders of fact, the jury and the trial judge. Yet only the judge is required to set forth his reasons for imposing the death penalty in writing. As a result, when the jury recommends life imprisonment, but the judge imposes a sentence of death, only the judge's reasoning is made known to the Supreme Court of Florida for purposes of review. Since the jury's findings concerning aggravating circumstances

are never reduced to writing, neither the defendant nor the court can ever know the basis for the jury's recommendation. When the jury's findings are unknown, it is impossible to compare the jury's reasoning with that of the trial judge to determine whose judgment was the more reasonable on the basis of the trial record.

Under the standard of Tedder v. State, 322 So.2d 908, 910 (Fla.1975), a sentence of death imposed following a jury recommendation of life cannot be sustained unless the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ. Yet application of the Tedder standard always involves a situation where the jury differs with the judge. To sustain a death sentence under the Tedder standard necessarily requires a determination that the jury's recommendation was unreasonable. No such determination can properly be made when the jury's reasons for recommending life are unknown. In the absence of written findings by the jury, the Supreme Court of Florida can only guess at whether the jurors chose to ignore the evidence and the law and recommend life on the basis of emotion, or whether they reasonably disagreed with the judge as to the aggravating and mitigating circumstances shown by the evidence or the weight to be given to such circumstances.

In the present case the court guessed that "the jury might well have been swayed by defense counsel's reading of an 'extremely vivid and lurid' description of an electrocution to the jury." (A5) Yet in the context of claims of prosecutorial misconduct, the court has refused to presume that jurors were improperly influenced by emotional argument of counsel. "'[I]t will not be presumed that...[jurors] are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel.'" Blair v. State, 406 So.2d 1103,1107 (Fla.1981), quoting, Paramore v. State, 229 So.2d 885,860 (Fla.1969). Furthermore, there were mitigating circumstances which the jury may have found in recommending life imprisonment: petitioner's

age of twenty-two with no significant history of prior criminal activity, his being married with two small children, and his employment history. (A4) Reasonable persons could disagree over whether petitioner should be sentenced to death on the basis of these mitigating circumstances.

Thus, application of the Tedder standard to uphold a sentence of death despite a jury recommendation of life violates due process for two reasons: (1) the absence of written findings by the jury regarding aggravating and mitigating circumstances makes rational review of the reasonableness of their recommendation and the judge's decision to override it impossible; (2) the standard itself is irrational because reasonable persons can and virtually always do disagree over whether a particular defendant should be sentenced to death. This Court should grant certiorari to review the Tedder standard and its application in order to prevent the State of Florida from depriving petitioner and other similarly situated persons of their lives without due process of law.

III.

WHERE THE JURY RECOMMENDS A SENTENCE OF LIFE IMPRISONMENT, IMPOSITION OF A DEATH SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

In Trop v. Dulles, 356 U.S. 86,100,101, 78 S.Ct. 590, 2 L.Ed.2d 630,642 (1958), this Court declared,

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.... The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

The assessment of contemporary values necessary for determining whether the death penalty is prohibited as cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution requires an examination of objective indicia reflecting the public attitude toward that penalty,

including jury determinations. Gregg v. Georgia, supra, 428 U.S. at 173,181, 49 L.Ed.2d at 874,879; Woodson v. North Carolina, 428 U.S. 280,288, 96 S.Ct. 2978, 49 L.Ed.2d 944,951,952 (1976). "[I]t is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." Coker v. Georgia, 433 U.S. 584,596, 97 S.Ct. 2861, 53 L.Ed.2d 982,992 (1977).

While the Florida death penalty statute may be constitutional on its face, Proffitt v. Florida, supra, that does not mean that it may not be applied in an unconstitutional manner in a given case. When the death penalty is imposed, as it was in this case, in contravention of a jury recommendation of life imprisonment, it has been imposed without regard for those evolving standards of decency from which the Eighth Amendment draws its meaning. In fact, the jury's recommendation constitutes the single most important indicator of whether the death penalty comports with community standards of decency in a given case. This is true because "a jury that must choose between life imprisonment and capital punishment can do little more--and must do nothing less--than express the conscience of the community on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510,519,520, 88 S.Ct. 1770, 20 L.Ed.2d 776, 783 (1968). As the Supreme Court of Florida recognized in McCaskill v. State, 344 So.2d 1276,1280 (Fla.1977), "Juries are the conscience of our communities."

Since juries are the conscience of our communities, a jury recommendation of life imprisonment reflects a determination that the death sentence does not comport with contemporary community standards in a particular case. To impose the death penalty in disregard of such a jury determination constitutes cruel and unusual punishment and violates the Eighth and Fourteenth Amendments. This Court should grant certiorari in order to prevent the State of Florida from inflicting a cruel and unusual punishment upon the petitioner and other similarly situated persons.

CONCLUSION

Because the imposition of a death sentence where the jury recommends a sentence of life imprisonment violates the constitutional guarantee against double jeopardy, deprives the condemned person of due process of law, and subjects him to cruel and unusual punishment, the petitioner asks this Court to issue a writ of certiorari to the Supreme Court of Florida.

Respectfully submitted,

BY: Paul C. Helm

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RALEIGH PORTER,

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APPENDIX

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Supreme Court of Florida

No. 61,063

RALEIGH PORTER, Appellant,

v.

STATE OF FLORIDA, Appellee.

[January 27, 1983]

PER CURIAM.

Porter appeals the death sentences imposed on him at resentencing. We have jurisdiction, article V, section 3(b)(1), Florida Constitution, and affirm the sentences.

A jury convicted Porter of first-degree murder for the death of an elderly man and his wife. This Court affirmed the convictions in Porter v. State, 400 So.2d 5 (Fla. 1981). The trial court, notwithstanding the jury's recommendation of life imprisonment, had sentenced Porter to death. In deciding on that sentence the trial court considered deposition testimony which had not been introduced as evidence without affording Porter the opportunity to rebut, contradict, or impeach that testimony. We found this procedure to be a violation of due process of law:

> Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.

Id. at 7. On remand the trial court again sentenced Porter to death.

Prior to Porter's trial, his defense attorney deposed Porter's former roommate, Larry Schapp. Schapp stated that

Porter had told him of previously being arrested for burglary and that he, Porter, intended to commit further burglaries. According to Schapp, Porter told him that stealing a car was one of his main interests and that, if necessary, he would leave no witnesses. Defense counsel specifically asked Schapp about this: "Q You mentioned leaving no witnesses. Did he talk about that possibility when he was talking about getting a car? A Yes."

At trial Schapp testified that Porter told him that he had robbed and killed the instant victims. Schapp also stated that he and another friend of Porter's took away and dumped a television set and some silverware that Porter had stolen from the victims. Neither the state attorney nor defense counsel questioned Schapp about his deposition st tements regarding Porter's intentions to steal a car and to leave no witnesses.

In his original sentencing order, the court made, among others, the following findings:

> 1. The capital felonies were committed while the defendant was engaged in the commission of a robbery for pecuniary gain. Testimony during the trial showed that the defendant, who had recently been released from the Florida State Prison, wanted an automobile, and from the first intended to steal it. He discussed this with his roommate, Larry Schapp, and mentioned that the victim should be newly arrived in the area and not well known. This way he could kill the owner of the car and possibly the neighbors would not even know a car had been stolen, which would allow the defendant more time to get away with the automobile. The person or persons selected to be victims would be left to chance.
>
> On August 21, 1978, the Walraths had been selected as the victims, and the defendant went to their home for the purpose of carrying out his plan. Upon entering their home he killed both of them and stole numerous items, including their automobile and television set, from them.
>
> 2. The capital felonies were committed for the purpose of avoiding or preventing a lawful arrest in that, as specified in number one above, defendant ab initio, from the beginning, intended to kill the victims to allow him more time to abscond with their automobile.

At the resentencing hearing the defense called Schapp and, in an attempt to impeach him, questioned him about his past

record.[1] The defense did not question Schapp about his deposition, but, in response to the state's question on cross-examination, Schapp said that he had told the truth in the deposition.

Following the hearing, the trial court again sentenced Porter to death. In aggravation the court found the murders to have been especially heinous, atrocious, and cruel as well as making two other findings as follows:

> 1. The two capital felonies were committed while the defendant was engaged in the commission of a robbery for pecuniary gain. Testimony during the trial showed that the defendant, who had recently been released from the Florida State Prison, wanted an automobile, and from the first intended to steal it.
>
> On August 21, 1978, the Walraths had been selected as the victims and the defendant went to their home for the purpose of carrying out his plan. Upon entering their home he killed both of them and stole numerous items including their automobile and television set, from them.
>
> 2. The capital felonies were committed for the purpose of avoiding or preventing a lawful arrest in that, as specified in #1 above, defendant ab initio intended to kill the victims to allow him more time to abscond with their automobile.

Porter now claims that omitting reference to Schapp's deposition means that the trial court relied only and entirely, in resentencing, on the material presented at trial. Because the evidence regarding Porter's plan to steal a car and leave no witnesses comes from Schapp's deposition and not from any trial testimony, Porter claims that the state did not carry its burden of proof regarding the findings set out above and that the court, therefore, erred in making those findings. We disagree.

The mandate of this Court required only that Porter be allowed to rebut, contradict, or impeach Schapp's deposition testimony. The defense attempted only to impeach Schapp's statement. It offered no evidence, i.e., testimony or evidence

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[1] He admitted to several convictions of driving while intoxicated and to being arrested for grand theft, with that charge later being dropped.

at resentencing that Porter did not say what Schapp claimed he said, to rebut or contradict that statement. Impeaching a witness goes only to that witness' credibility, and in the absence of rebuttal or contradictory evidence the trial court could justifiably rely on Schapp's deposition testimony. The essential findings of the trial judge are supported by the record.

Porter also claims that the state did not prove, beyond a reasonable doubt, that he committed the murders for pecuniary gain because it did not prove that he profited from the murders. In his brief Porter admits that the state proved that he took his victims' automobile, television, silverware, jewelry, and other items. We do not find his later giving away, throwing away, or abandoning these articles material in view of the proof that he stole them in the first place. Likewise, we find that the record supports the trial court's finding that the murders were heinous, atrocious, and cruel.

Porter contends the court erred in not finding the following as mitigating circumstances: Porter's age; his being married with two small children; no significant history of prior criminal activity; and his employment history.[2] There is no requirement that a court must find anything in mitigation. The only requirement is that the consideration of mitigating circumstances must not be limited to those listed in section 921.141(6), Florida Statutes (1981). What Porter really complains about here is the weight the trial court accorded the evidence Porter presented in mitigation. However, "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence." Quince v. State, 414 So.2d 185, 187

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[2] Porter was 22 years old at the time of the crimes. Additionally, although Porter had been married and had fathered 2 children, at the time of the crimes he was living with a woman other than his wife. At resentencing the trial court allowed Porter to put on more mitigating evidence. The court, therefore, did not restrict the presentation of mitigating evidence, but merely found that the evidence presented carried little or no weight in mitigation.

(Fla. 1982). We do not find that the trial court failed to consider the evidence presented in mitigation of the sentence.

The trial court again overrode the original jury's recommendation of life imprisonment in resentencing Porter to death. On this appeal Porter again contends that the jury override does not meet the standard set out in Tedder v. State, 322 So.2d 908 (Fla. 1975), where this Court held: "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Id. at 910. The record in this case supports the court's findings regarding the aggravating and mitigating circumstances. As noted by the trial court, the jury might well have been swayed by defense counsel's reading of an "extremely vivid and lurid" description of an electrocution to the jury. Additionally, the trial court had access to Schapp's deposition, which the jury did not see. This case, therefore, is similar to White v. State, 403 So.2d 331 (Fla. 1981), where we affirmed a jury override. Defense counsel's description of an electrocution might well have been calculated to influence the recommendation of a life sentence through emotional appeal. On the facts of this case, we find, even according the jury recommendation its due deference, that these sentences meet the Tedder standard.

As his final point on appeal, Porter claims that imposing a death sentence over a jury's recommendation of life imprisonment puts a defendant in double jeopardy, violates the due process clause, and constitutes cruel and unusual punishment. We have consistently decided those issues contrary to Porter's contentions, Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Phippen v. State, 389 So.2d 991 (Fla. 1980); Douglas v. State, 373 So.2d 895 (Fla. 1979), and we decline Porter's invitation to revisit them. We therefore affirm Porter's two sentences of death.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Charlotte County, Richard M. Stanley, Judge - Case No. 78-199-CF-A-RMS

Jerry Hill, Public Defender and Paul C. Helm, Assistant Public Defender, Chief, Appellate Division, Tenth Judicial Circuit, Bartow, Florida, for Appellant

Jim Smith, Attorney General and Robert J. Landry, Assistant Attorney General, Tampa, Florida, for Appellee

IN THE SUPREME COURT OF FLORIDA

THURSDAY, APRIL 28, 1983

RALEIGH PORTER,	**	
Appellant,	**	CASE NO. 61,063
vs.	**	Circuit Court Case No. 78-199-CF-A-RMS (Charlotte)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy Clerk

C
cc: Hon. Buddy Clark Alexander, Clerk
Hon. Richard M. Stanley, Judge

Paul C. Helm, Esquire
Robert J. Landry, Esquire

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8663.240; s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 249, ch. 77-104; s. 1, ch. 77-174.

Raleigh PORTER, Appellant,

v.

STATE of Florida, Appellee.

No. 55841.

Supreme Court of Florida.

June 4, 1981.

Defendant was convicted in the Circuit Court, Charlotte County, Richard M. Stanley, J., of first-degree murder and sentenced to death. Appeal was taken. The Supreme Court held that: (1) the evidence was sufficient to sustain the finding that the defendant had caused the victims' deaths while engaged in the crime of robbery; (2) the refusal to allow the defendant to voir dire the grand jury in order to determine if he had a basis to challenge a juror or jurors did not render the indictment invalid, and (3) the trial court's reliance on testimony conveyed in a deposition in imposing the death sentence on the defendant denied the defendant due process of law where neither the defendant nor his counsel was advised that the information was going to be used.

Convictions affirmed; sentences vacated.

Alderman, J., concurred specially with an opinion.

Adkins, J., concurred in part and dissented in part.

1. Homicide ⇐235

In prosecution for first-degree murder, evidence was sufficient to find that defend-

(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

ant caused victims' deaths while he was engaged in crime of robbery.

2. Grand Jury ⇐18

Even if defendant had right to voir dire examination of grand jurors after grand jury had been empaneled, grand jury indictment charging defendant with first-degree murder was not subject to dismissal on grounds that defendant had not been allowed to voir dire grand jury, where defendant did not file motion to challenge juror or jurors, but rather, his motion was for voir dire of grand jury to determine if he had basis to so challenge. West's F.S.A. §§ 905.04(1)(b), 905.05.

3. Criminal Law ⇐986.2(1)

Should sentencing judge intend to use any information not presented in open court as factual basis for sentence, he must advise defendant of what it is and afford defendant opportunity to rebut it. U.S.C.A.Const. Amends. 5, 14.

4. Constitutional Law ⇐270(2)

In prosecution for first-degree murder wherein defendant was sentenced to death, trial court's reliance on testimony given by witness in deposition, not at trial, deprived defendant of due process of law where neither defendant nor his counsel was advised that such information was going to be used in sentencing. U.S.C.A.Const. Amends. 5, 14.

Jerry Hill, Public Defender, and Paul C. Helm, Asst. Public Defender, Bartow, for appellant.

Jim Smith, Atty. Gen., and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Having been convicted of first-degree murder for the slaying of Harry G. Walrath and Margaret Ann Walrath, Raleigh Porter was sentenced to death. This Court has jurisdiction.* We affirm the convictions but reverse the sentence because of procedural error.

* Art. V, § 3(b)(1), Fla.Const.

[1] The sufficiency of the evidence to sustain the convictions has not been raised. We have, however, carefully reviewed it. That review clearly discloses that Porter broke and entered the home of Mr. and Mrs. Walrath, a retired elderly couple living the remaining years of their lives together in Charlotte County, Florida. Inside their home Porter encountered the Walraths, whereupon he struck and beat them. Thereafter he strangled them with an electrical cord. Their car and goods taken from their home were later linked to Porter. Porter voluntarily made incriminating statements. The evidence is sufficient to find that Porter caused the Walrath's deaths while he was engaged in the crime of robbery.

[2] There was a large amount of publicity surrounding this crime. Apprehensive of its effect on the grand jury (which had been empaneled prior to the commission of this crime), counsel for the defendant sought the right to voir dire the grand jury. His motion asked permission to question the individual jurors regarding their legal qualification, to inquire into the state of mind of the jurors to discover whether there were any facts that would prevent the grand jury from acting impartially and without prejudice to the rights of the defendant, and to determine whether the jurors knew that a sentence of death might be imposed if the defendant were convicted of the offense sought to be charged by indictment. The trial judge denied that motion. After an indictment was returned the appellant moved to quash the indictment on several grounds, one of which was the judge's refusal of the requested voir dire examination. This also was denied. Appellant contends error was committed by denying these motions. This is not so.

Section 905.04(1)(b), Florida Statutes (1977), provides that a person who has been held to answer may challenge an individual prospective grand juror on the ground that the juror has a state of mind that will

prevent him from acting impartially and without prejudice to the substantial rights of the party challenging. Section 905.05, Florida Statutes (1977), allows a belated right to challenge the grand jury to a person who did not know at the time the grand jury was empaneled that he was subject to grand jury action. These statutes are an extension of prior law which had limited challenges of grand jurors to the time of empanelment and on the grounds of legal qualifications. This Court, in sustaining the prior rule, made a point of the different roles of the grand jury and the petit jury. *See, e. g., Lake v. State*, 100 Fla. 373, 129 So. 827 (1930); *Reed v. State*, 94 Fla. 32, 113 So. 630 (1927). Although these statutes extend the grounds for challenge to a grand juror, no statute or rule provides for voir dire examination of a grand juror after the grand jury is empaneled. The difference between the roles of the grand jury, to investigate and accuse, and that of a petit jury, to find facts, supplies a basis to provide voir dire for petit jurors but to omit it for grand jurors.

Porter did not file a motion to challenge a juror or jurors in this cause. His motion was to voir dire the grand jury to determine if he had a basis to so challenge. Later he filed a motion to dismiss the indictment because he could not voir dire the jury.

The State of Maine apparently would allow voir dire in certain exigent situations. *See State v. Warren*, 312 A.2d 535 (Me. 1973). Even if Florida were to follow the direction of Maine, which we do not feel we should do in the absence of a statute or a rule, the exigent circumstances that authorize voir dire in Maine do not exist in this case, just as they did not in *Warren*.

No error was shown in the composition of this grand jury nor was there error in disallowing the voir dire examination of the grand jury. The indictment was valid.

We next turn our attention to the sentencing phase of this case. The trial jury recommended a life sentence following a sentencing hearing, but the trial judge, finding three aggravating circumstances and no mitigating circumstances, imposed the death sentence. The first two aggravating points were that the felonies were committed for pecuniary gain and for the purpose of avoiding or preventing lawful arrest. A substantial portion of the basis for these findings was the testimony of an acquaintance of the appellant, Larry Schapp. The difficulty lies in the fact that the critical findings did not come from Schapp's *trial* testimony, but rather from testimony he had given in a *deposition*. The trial judge never advised the appellant of his intention to utilize the deposition and never afforded the appellant an opportunity to rebut, contradict, or impeach the deposition testimony.

[3] In *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the United States Supreme Court reminded us that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. *Gardner* held that using portions of a presentence investigation report without notice to the defendant and without an accompanying opportunity afforded to the defendant to rebut or challenge the report denied due process. That ruling should extend to a deposition or any other information considered by the court in the sentencing process which is not presented in open court. Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.

[4] In the instant case the trial judge sentenced Porter to death, relying in part on information concerning appellant's alleged discussion of a plan to select newly arrived residents, steal their automobiles, and, if necessary, kill them. These facts were not proved at trial. Neither Porter nor his counsel was advised that this information, gleaned from the deposition, was going to be used. By proceeding in this manner, the trial judge deprived Porter of due process of law.

This Court is not saying that there is an insufficient basis in the record to sustain the judge's imposition of the death penalty. There may very well be, notwithstanding the jury's recommendation of a life sentence. We are not making a substantive determination of what the proper sentence should be.

The convictions are affirmed. The sentences are vacated, however, and this cause is remanded to the trial judge for resentencing in accordance with the guidelines and directions expressed herein.

It is so ordered.

SUNDBERG, C. J., and BOYD, OVERTON, ENGLAND and McDONALD, JJ., concur.

ALDERMAN, J., concurs specially with an opinion.

ADKINS, J., concurs as to conviction and dissents as to sentence.

ALDERMAN, Justice, concurring specially.

I agree with the majority opinion. I concur specially, however, to point out that here the facts as found by the trial court suggesting a sentence of death are so clear and convincing that no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975). The only basis for the jury recommendation of life was the vivid and lurid description of an execution by electrocution permitted by the court, without objection by the State, to be read to the jury by defense counsel. In its sentencing order, the trial court expressly recognized that the jury was affected by this evidence which should never have been admitted. The State should have objected to this evidence, and the court should have sustained the objection and not allowed this highly inflammatory description to be read to the jury. We have recently ruled that such a description of the electrocution process is not relevant and should be excluded. In *Shriner v. State*, 386 So.2d 525, 533 (Fla. 1980), we said:

> Equally meritless is the contention that it was error to exclude the testimony of a priest who had witnessed an execution by electrocution. While it is settled that an advisory jury and trial judge may consider evidence of mitigating factors beyond those enumerated in section 921.141(6), Florida Statutes (1977), the evidence must be relevant to the sentencing inquiry. We do not believe that a descriptive account of an electrocution would aid the jury or judge in their effort to apply section 921.141 fairly and correctly. Indeed, such evidence would more likely serve to distort and obfuscate the sentencing process. [Footnote omitted.]

The only reason for remanding this case for resentencing by the trial judge is to give the defendant an opportunity to rebut the deposition testimony of Larry Schapp.

KEY NUMBER SYSTEM

CERTIFICATE OF SERVICE

I, PAUL C. HELM, a member of the Bar of the Supreme Court of the United States and counsel of record for RALEIGH PORTER, the Petitioner, hereby certify that on June 9, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Petition for Writ of Certiorari, with attached Appendix, on each of the parties as follows:

On the State of Florida, the Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to ROBERT J. LANDRY, Assistant Attorney General, as counsel for Respondent, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, June 9, 1983.

BY: Paul C. Helm
PAUL C. HELM
Assistant Public Defender
Chief, Appellate Division

Case No. 82-6937

IN THE

SUPREME COURT OF THE UNITED STATES

RALEIGH PORTER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RECEIVED
JUN 11 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, RALEIGH PORTER, through his undersigned counsel and pursuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Petitioner has been represented by appointed counsel throughout his state court proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

BY: Paul C Helm

PAUL C. HELM
Assistant Public Defender
Chief, Appellate Division
Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813) 522-0931 or 533-1184

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

RALEIGH PORTER,	:	82-6937
Petitioner,	:	
vs.	:	Case No. 61,063
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

RECEIVED
JUN 11 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF
PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, RALEIGH PORTER, being first duly sworn, depose and say that I am the Petitioner in the above styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefor; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on November 30, 1978, in the Circuit Court for Glades County, Florida, for two counts of first degree murder in a single jury trial.

2. I received a sentence of death for each count of first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed all of my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state court proceedings

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

RALEIGH PORTER

Subscribed and sworn to before me on this 10 day of May, 1983.

Notary Public

My Commission Expires:

CERTIFICATE OF SERVICE

I, PAUL C. HELM, a member of the Bar of the Supreme Court of the United States and counsel of record for RALEIGH PORTER, the Petitioner, hereby certify that on June 9, 1983, pursuant to Supreme Court Rule 28, I served a single copy of the foregoing Motion for Leave to Proceed in Forma Pauperis on each of the parties as follows:

On the State of Florida, the Respondent, by depositing said copy in the United States Post Office, Bartow, Florida, with first class postage prepaid, properly addressed to ROBERT J. LANDRY, Assistant Attorney General, as counsel for Respondent, at Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

All parties required to be served have been served this date, June 9, 1983.

BY: Paul C. Helm
PAUL C. HELM
Assistant Public Defender
Chief, Appellate Division